

# The Initiative and Referendum in Ohio

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This paper is designed as an expository treatment of the process of popular legislation at the state level in Ohio. The primary concern is with the "how" of the subject without critical re-examination of the "why." The policy aspects are intriguing; they challenge separate discussion in relation to possible constitutional revision in Ohio.<sup>1</sup>

The initiative is a device by which any person or group of persons may draft a statute and, by securing to a petition the signatures of a minimum number of qualified voters, require the appropriate state officials (with or without action upon it by the legislature) to submit the measure to the electorate at a general or special election.<sup>2</sup> If an initiated measure is approved by the required majority, it becomes a law. In some states the device may be employed to amend the constitution. The true initiative has two forms. The direct initiative gets a measure to the voters without the necessity for first submitting it to the legislature in order to permit consideration there before referral to the voters may be required.<sup>3</sup>

The referendum is a device whereby a measure, already adopted by a representative legislative body or constitutional convention, is held in suspense until it shall have been submitted to the voters at a general or special election, there to be ratified or rejected by majority vote.<sup>4</sup> There are compulsory, voluntary and optional types of referenda. In the case of the compulsory refer-

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<sup>1</sup> At the general election in November 1952 the voters of Ohio are scheduled to vote, under Section 3 of Article XVI of the constitution, on the question "Shall there be a convention to revise, alter or amend the constitution?" For a general discussion of this subject, see Fordham, *Some Aspects of Constitutional Revision in Ohio*, 23 OHIO BAR 181 (1950).

<sup>2</sup> 1 *Bulletins for the Constitutional Convention*, Massachusetts 1917-18, p. 183. Mr. Luce would confine "initiative" literally to initiating the making of law: "... taking the terms as we find them, we shall approach clear thinking if we try to restrict 'initiative' to that independent process whereby an electorate begins the making of a law; 'referendum' to that process whereby an electorate completes or prevents the making of a law; and 'direct legislation' to that process of law-making wherein a representative body plays either a subordinate part or no part at all." LUCE, *LEGISLATIVE PRINCIPLES* 565 (1930).

<sup>3</sup> 1 *Bulletins for the Constitutional Convention*, Massachusetts 1917-18, p. 183.

<sup>4</sup> *Ibid.*

endum a measure must go to the electors and receive a majority vote before it may become operative. This type is used to a great extent in the amending of state constitutions. The voluntary type is referral to the voters by the legislature at its own instance. Under the optional form a referendum is had responsive to a petition of a percentage of the electors. It is the optional type which is usually embraced in the combination of the initiative and referendum.

Although these devices did not gain a foothold in the United States, as applied to ordinary legislation, until the end of the nineteenth century, popular legislation is a governmental process of great antiquity.<sup>5</sup> The initiative, in its modern form, was born in Switzerland about about a century ago.<sup>6</sup>

It was in 1898 that popular legislation secured constitutional recognition in American state government. In that year South Dakota amended her constitution to permit the use of the initiative and referendum at the statutory level.<sup>7</sup> In the years from 1900 to 1909 six states followed the example of South Dakota.<sup>8</sup> Four of these states extended the initiative provisions to amendments to their state constitutions.<sup>9</sup> In the so-called "progressive era," 1910 to 1915, twelve states adopted provisions permitting both the initiative and the referendum.<sup>10</sup> Ten of those states, including Ohio, made the initiative available as to constitutional amendments.<sup>11</sup> New Mexico and Maryland have provided for the referendum alone.<sup>12</sup> There has been scant development since 1915; only Massachusetts has been added to the list of initiative and

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<sup>5</sup> LOBINGIER, *THE PEOPLE'S LAW* 1 (1909).

<sup>6</sup> Rappard, *The Initiative, Referendum and Recall in Switzerland*, 63 *THE ANNALS* 110, 131 (1912).

<sup>7</sup> S. DAK. CONST. Art. III, § 1.

<sup>8</sup> The states, with dates of original adoption noted, are: Utah, Art. VI, § 1(2) (1900); Oregon, Art. IV, §§ 1, 1a, Art. IX, §§ 1, 1a, Art. XI, § 10, Art. XVII, § 1 (1902); Montana, Art. V, § 1 (1906); Oklahoma, Art. V, §§ 1-4, 6-8, Art. XVIII, § 4(a) to 4(e) (1907); Maine, Art. IV, Pt. I, § 1, Art. XXXI (1908); Missouri, Art. III, §§ 49-53, Art. XII, § 2B (1908).

<sup>9</sup> Utah, Oregon, Oklahoma and Missouri.

<sup>10</sup> The states with dates of original adoption noted, are: Arkansas, Art. V, § 1 (1910); Colorado, Art. V, § 1 (1910); Arizona, Art. IV, § 1, Art. XXI, § 1, Art. XXII, § 14 (1911); California, Art. IV, §§ 1, 1b (1911); Nebraska, Art. III, §§ 1-4 (1912); Washington, Art. II, § 1, Art. XI, §§ 2, 4, 10 (1912); Idaho, Art. III, § 1 (1912); Ohio, Art. II, §§ 1-1g (1912); Nevada, Art. XIX, §§ 1-3 (1912); Michigan, Art. V, §§ 1, 30, 38, Art. XVII, §§ 1-3 (1913); North Dakota, Art. II, § 25, Art. XV, § 202; Mississippi (1914 — held invalid in *Power v. Robertson*, 130 Miss. 188, 93 So. 769 (1918)).

<sup>11</sup> The exceptions were in Idaho and Washington.

<sup>12</sup> The states, with dates of original adoption noted are: New Mexico, Art. IV, § 1 (1911) and Maryland, Art. XVI (1915).

referendum states.<sup>13</sup> On the other hand, no state has abandoned the initiative and referendum, once provision has been made for them in its constitutional scheme.

There is no federal bar to state use of direct legislation. An effort was once made to persuade the United States Supreme Court that the device violated the republican form of government clause of the Constitution, but the court categorized the contention as a political question not for judicial determination.<sup>14</sup>

Ohio adopted the initiative and referendum in 1912. Popular legislation was one of the liveliest topics of discussion to engage the attention of the constitutional convention of that year. Among those who spoke in favor of the innovation was Theodore Roosevelt, who appeared by invitation. It is of interest, as an historical aside, that the Colonel even spoke out for the recall of judicial decisions.<sup>15</sup> One of the objections which seemed to cause the most concern was the suggestion that the then still active movement for the single tax would stand a better chance of success in Ohio through direct legislation than through action of the general assembly. An accommodation was achieved by so amending the proposal as to ban resort to direct legislation to embrace Henry George's darling.

The record of direct legislation in Ohio discloses the interesting fact that the device has been employed more freely at the constitutional than the statutory level. Between 1912 and 1950 twenty-nine constitutional amendments were proposed by the initiative. Nine were ratified. During the same period fifteen of twenty-nine amendments proposed by the general assembly were approved. Seventeen legislative measures have been proposed by the initiative. Of these, three were enacted by the general assembly. Three of those not so enacted were carried to the voters by supplemental petition; one was adopted. As for the referendum, we find that ten measures have been referred and, of them, all save one were disapproved at the polls.<sup>16</sup>

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<sup>13</sup> MASS. CONST. ART. OF AMEND. LXXIV (1918).

<sup>14</sup> *Pacific State Telephone and Telegraph Company v. Oregon*, 223 U.S. 118 (1911).

<sup>15</sup> 1 OHIO CONSTITUTIONAL CONVENTION 1912, PROCEEDINGS AND DEBATES 378. Also of interest is Art. IV, § 7 of the constitution as amended in 1912. The movement for popular legislation led to this amendment whereby through a petition and an election, the voters of smaller counties could cause a unification of the probate and common pleas courts.

<sup>16</sup> *Legislative Reference Division, Ohio State Library, Operation of the Initiative and Referendum in Ohio, 1931*; OHIO ELECTION STATISTICS.

## INITIATIVE

1. *Matters or Areas to which the Initiative Applies*a. *Constitutional Amendments*

Sections 1 and 1a of Article II of the Ohio Constitution reserve to the "people" the power, through the initiative, to amend the constitution. There are no express substantive limitations upon that power. It has been suggested, however, that there is an implied limitation which precludes amendment, in this wise, of the initiative or referendum sections of the constitution. Were this not so, it is said, all the procedural protections insisted upon by the conservative element in the 1912 Convention could be eliminated. To eliminate "dangers" of this nature; Mr. James P. Richardson introduced two resolutions in the Massachusetts Convention of 1918, which were designed to place their provisions beyond the reach of the initiative.<sup>17</sup> In Ohio there have been two unsuccessful attempts to amend the initiative and referendum provisions.<sup>18</sup> We are unable to find a rational basis for the asserted limitations. If certain provisions are considered so important that they should not be subject to change in this way an express limitation is called for. Thus, Arizona has provided by an initiated constitutional amendment that the legislature may not repeal or amend initiated or referred measures approved by the people,<sup>19</sup> and this provision has been given effect by the courts.<sup>20</sup> While the limitation related to measures of statutory, and not constitutional dignity, the point is the same.

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<sup>17</sup> 2 DEBATES IN THE CONSTITUTIONAL CONVENTION, Massachusetts 639, 950. The resolutions read: "No part of the Constitution which provides for the establishment of the initiative and referendum shall be the subject of an initiative petition." These amendments were rejected by votes of 106 to 129 and 137 to 140. This gentleman, with others, was successful, however, in adding the following clause to a provision relating to excluded matter: "No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; *nor shall this section be the subject of such a petition.*" (Italics ours).

<sup>18</sup> The first attempt was in 1915 when the people defeated a proposed amendment to limit elections on twice defeated constitutional proposals and to prevent the abuse of the initiative. The second attempt, while being approved at the polls, was short-lived; this was the amendment to Article II, Section 1, which reserved to the people the legislative power of the referendum on the action of the assembly ratifying a proposed amendment to the Federal Constitution. This amendment was declared unconstitutional in *Hawke v. Smith*, 253 U.S. 221 (1920), on the basis of the Federal Constitution. Nowhere in the opinions there or in the Supreme Court of Ohio, is found any argument that the section was invalid as not dealing with a proper subject of amendment by the initiative.

<sup>19</sup> ARIZ. CONST. Art. IV, pt. 1, § 6.

<sup>20</sup> *State ex rel. Conway v. Superior Court*, 60 Ariz. 69, 131 P. 2d 983 (1942); *Williard v. Hubbs*, 30 Ariz. 417, 248 Pac. 32 (1926).

### b. Legislation

Certain limitations are imposed on the people's power to adopt initiated laws. Some of these are expressly written into the constitution while others have been worked out in the process of judicial decision. Article II, Section 1e, prohibits the use of the initiative process to enact "a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property." While, as we have seen, the single tax movement was still vigorous in 1912, at this day the fear of the ghost of Henry George seems very unreal. In view of the relative ease of amending the constitution, this limitation is pretty weak, in any event.

The constitutional limitations on the power of the general assembly to enact laws are made applicable in broad terms to popular legislation. This is generally taken to refer only to substantive limitations. Constitutional limitations on legislative procedure are not appropriate to the processes of popular or direct legislation.

The question whether constitutional provisions as to form and style of bills and laws apply to initiated measures is more troublesome. Are they limitations on legislative power? It should be noted at once that Section 1g of Article II prescribes a form of enacting clause for initiated measures. That section also refers to the title of such a measure but is silent as to form and content of both title and body. It will be remembered that Section 16 of Article II requires that a bill originating in the general assembly be confined to a single subject clearly expressed in its title. The supreme court considers these requirements merely directory,<sup>21</sup> but the legislature, to its lasting credit, conscientiously abides by them anyway. Even if they were, by interpretation, carried over to the initiative it is not evident that they would harden into something of a mandatory character. On the same footing is the second part of the companion requirement that an amendatory law contains the entire section or sections amended and repeal the section or sections amended (as they theretofore stood).<sup>22</sup> The first part,

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<sup>21</sup> *Weil v. State*, 46 Ohio St. 450, 21 N.E. 643 (1889); *Pim v. Nicholson*, 6 Ohio St. 176 (1856).

<sup>22</sup> This is shown by the approval of the Ohio courts of the doctrine of repeal by implication. See, e.g., *Kinsey v. Bower*, 147 Ohio St. 66, 68 N.E. 2d 217 (1947); *Goff v. Gates*, 87 Ohio St. 142, 100 N.E. 329 (1912); *State v. Board of Commissioners of Wyandot County*, 9 Ohio Cir. Dec. 90 (1897), *affirmed* *Board of Commissioners v. State ex rel. Cuneo*, 57 Ohio St. 661, 50 N.E. 1127 (1897).

as to setting the amended sections out at length, is, however, deemed mandatory.<sup>23</sup> In the absence of an authoritative ruling on the question, the sensible course is to adhere to the rule in drafting an initiated measure of an amendatory character.

The courts have recognized an implicit limitation on the municipal initiative. The initiative and referendum are reserved to the "people" of a municipality as to any subject of municipal legislative action.<sup>24</sup> It appeared in *State ex rel. Smith v. City of Fremont*,<sup>25</sup> that the state health authorities had ordered the city to change its water supply source or install purification facilities. The day before a water filtration plant bond ordinance of the city was adopted by council on third reading an inconsistent measure, which called for a change from a river to deep wells as the source of supply, was put forward by initiative petition. At the next general election the initiated measure was approved by the voters. Mandamus to compel action under the initiated ordinance was denied by the supreme court in a brief per curiam opinion on the theory that the initiative may not be used as a substitute for the referendum. Council's ordinance was adopted as an emergency measure and as such was not subject to referendum. Since the Ohio courts refrain from reviewing legislative declarations of emergency,<sup>26</sup> the effect of the decision is to enable a municipal governing body to put its measures beyond the reach of either the initiative or the referendum. This is made the more clear by the critical statement in the opinion that the initiated measure was an attempt to repeal legislative action. The attorney general has so construed the court's language in ruling that the initiative could not be used to repeal a non-emergency ordinance on which the ninety-day referendum period had run.<sup>27</sup> The municipal initiative and referendum may be regulated by the exercise of home rule charter-making power.<sup>28</sup> On this basis the Court of Appeals for Cuyahoga County has decided that a charter provision permitting repeal of an ordinance by an initiated measure is valid.<sup>29</sup>

We are not aware of any instance in which this implicit limitation has been invoked at the state level. Nor have we, on the other hand, found any logical basis for denying its application to statutes. It is true that under the general statute an initiated ordi-

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<sup>23</sup> *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917).

<sup>24</sup> OHIO CONST. Art. II, § 1f.

<sup>25</sup> 116 Ohio St. 469, 157 N.E. 318 (1927).

<sup>26</sup> *State ex rel. Schorr v. Kennedy*, 132 Ohio St. 510, 9 N.E. 2d 278 (1937).

<sup>27</sup> 1948 Ops. Att'y Gen. (Ohio) No. 4252.

<sup>28</sup> OHIO GEN. CODE § 4227-12. Applied in: *State ex rel. Daniels v. Council of City of Portsmouth*, 136 Ohio St. 15, 22 N.E. 2d 913 (1939); *Dillon v City of Cleveland*, 117 Ohio St. 258, 158 N.E. 806 (1927).

<sup>29</sup> *Ferguson v. Wiegand*, 34 Ohio Law Rep. 257 (1931).

nance is not channeled through council, whereas an initiated statute must be subjected to consideration by the general assembly. This provides some procedural basis for a distinction but it is not compelling because, even under the state pattern, the last word is with the electors. The difficulty is with the proposition *per se*. As indicated by the dissenters in the *Fremont* case, the design of the constitutional reservation of powers to the electors was to enable them to enact legislation as a part of the legislative power of the state on at least an equal footing with the representative legislative body, but the decision of the court left them far short of that.<sup>30</sup> The legislative body can repeal popular legislation<sup>30a</sup> and it can, as we have seen, by an emergency clause, put a measure beyond reach of the referendum. Yet, we are told, the electors cannot, by initiative, repeal a legislative enactment.

Initiative and referendum provisions have, in other states, been declared inapplicable to municipal legislation administrative in character.<sup>31</sup> Considerable confusion has resulted from this rule due to the difficulty of determining just what action is legislative. Most of the few Ohio cases involving this problem relate to the referendum and will be discussed under that head.<sup>32</sup> In *Goodman v. Hamilton*,<sup>33</sup> the court held that an initiated ordinance, authorizing and directing a city official to enter into a contract with a public utility company to obtain artificial gas for the city, was legislative in nature and a valid act. Whatever may be the position taken as to municipal measures, there is no sound basis that one can readily perceive for engrafting an exception onto the state initiative and referendum with respect to measures deemed administrative. Apart from express limitations, the power reserved to the electors is as broad as that vested in the general assembly. As a practical matter, moreover, a local governing body is likely to deal much more directly with administrative matters than is a state legislature.

Particular note may be made of the fact that the initiative may be used to levy a state tax or make an appropriation of state funds. Theoretically, this could have absurd effects upon the state budget. In practice, the power has not been so employed. The most the voters have done is repeal the tax on colored oleomargarine by initiative in 1949.

## 2. Preliminary Steps

Section 1g of Article II, ordains that the provisions of that section (presumably Section 1 and all its subsections) shall be self-

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<sup>30</sup> 116 Ohio St. 469, 472, 157 N.E. 318 (1927).

<sup>30a</sup> State *ex rel.* Singer v. Cartledge, 129 Ohio St. 279, 195 N.E. 237 (1935).

<sup>31</sup> Keigley v. Bench, 97 Utah 69, 89 P. 2d 480 (1939); Note: 122 A.L.R. 769.

<sup>32</sup> Page 523, *infra*.

<sup>33</sup> 21 Ohio App. 465, 153 N.E. 217 (1926).

executing, except as otherwise provided, and that laws may be passed to facilitate their operation, "but in no way limiting or restricting either such provisions or the powers herein reserved." The legislature has enacted implementing sections,<sup>34</sup> among which is one requiring proponents to give notice of their intention to circulate petitions.<sup>35</sup> This is done by filing a petition, signed by one hundred qualified electors, and a summary of the proposal with the attorney general for examination.<sup>36</sup> If the summary is, in the opinion of that officer, a fair and truthful statement, he must so certify.<sup>37</sup> A verified copy of the proposal, together with the summary and the certificate, is then filed with the secretary of state whose duty it is, in turn, to designate the size, color and weight of the paper to be used and the general arrangement of the petition. There are other provisions governing printing, control, and disposal of blank petitions by the secretary of state, and payment to that officer by the petitioning committee for the costs of printing.<sup>38</sup>

The question whether these are all true implementing provisions or constitute restrictions on the powers reserved to the voters by the constitution has not been adjudicated. It is hardly cause for serious concern. The requirement of one hundred signatures is not onerous; those signers would be but a tiny fraction of the immensely larger total needed to get a measure to the legislature and they would serve as some indication to the attorney general that the petition was being put forward on a serious basis. It is required that the summary be reproduced on the printed petition. The apparent purpose is to help the persons, whose signatures are sought, to get with facility an understanding of what the proposal is about. The attorney general doubtless could be required by mandamus to certify an adequate summary but the supreme court has denied the writ in an instance where the "summary" was longer than the text. That, observed the Chief Justice, simply was not a summary.<sup>39</sup>

### 3. *Form of Petition*

The constitution expressly permits the presentation of petitions in separate parts, but each part must contain all the elements of a

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<sup>34</sup> OHIO GEN. CODE §§ 4785-175 to 4785-183.

<sup>35</sup> OHIO GEN. CODE § 4785-175.

<sup>36</sup> The attorney general will not certify unless the summary is accompanied by a petition of one hundred signatures. 1930 Ops. Att'y Gen. (Ohio) No. 1854.

<sup>37</sup> Under a former statute calling for a fair and impartial synopsis the attorney general ruled that arguments may not be included in a synopsis. 1930 Ops. Att'y Gen. (Ohio) No. 1854. It is doubted that the statutory change to "fair and truthful" would affect this ruling.

<sup>38</sup> OHIO GEN. CODE §§ 4785-175, 4785-176a, 4785-177c (Supp. 1949).

<sup>39</sup> *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 27, 176 N.E. 664 (1931).



complete petition.<sup>40</sup> This is a practical necessity. The constitution requires that a petition bear "across the top" a prescribed caption<sup>41</sup> and that there be set out in the petition the full text of the proposed law or proposed constitutional amendment with the prescribed enacting clause or resolving clause, as the case might be.

The implementing statute<sup>42</sup> goes much further; it not only prescribes the form of petition but requires that there be elements not exacted by the constitution. The statute requires that the words "initiative petition" be placed at the top of the petition. This is to be followed by a place for numbering each part of the petition. Next there is a place for inserting the name of the solicitor to whom the part is issued. Below this is a place for inserting the date of issuance. After these items comes the caption required by the constitution. It may be doubted that this departure from the literal language of the constitution is serious, since the matters set ahead of the caption are simply useful mechanics for administrative purposes.

The statute requires that, following the constitutional caption, there be set forth the summary and then the certification of the attorney general as to the summary, under proper date. Then must follow the names and addresses of a committee of from three to five members to represent the petitioners in all matters relating to the petition or its circulation.<sup>43</sup> The next item is a notice, printed in red, that one who signs more than once or signs a name other than his own or signs when not a qualified voter is subject to prosecution. Then follows a place for a statement of the amount the solicitor has received or expects to receive for his services and from whom. The address of the person paying for the services must be given. (The solicitor must fill in his part before any elector signs. Of course, he can fill in "nothing," if he is not working for pay.) The next item is the following legend before the signatures: "Sign with ink or indelible pencil. Your name, residence, and date of signing must be given." The text of the proposal must be set out immediately following the place for signatures and it must begin with the prescribed resolving or enacting clause, as the case may

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<sup>40</sup> OHIO CONST. Art. II, § 1g.

<sup>41</sup> For constitutional proposals, the caption reads: "Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the Electors." Art. II, § 1a. For legislative changes the caption reads: "Law Proposed by Initiative Petition First to be Submitted to the General Assembly." The capitalization of both captions is slightly changed in OHIO GEN. CODE § 4785-176.

<sup>42</sup> OHIO GEN. CODE § 4785-176.

<sup>43</sup> The requirement of a committee is ordained by OHIO GEN. CODE § 4785-180. This requirement of a committee of not less than three purports to deny to the "lone wolf" the rights of the initiative or referendum processes.

be. The final item is an affidavit of the solicitor. The precise form is fixed by the statute.

It should be observed that the statute in requiring a fixed form of petition uses the qualifying word "substantially", which is designed to obviate any questions based on minor deviations.<sup>44</sup>

#### *4. Obtaining Copies of Petition for Circulation*

As already mentioned, the secretary of state orders the printing of all petitions and retains their possession until certain formalities are complied with. In order for the committee of petitioners to obtain blank part-petitions, they must file a list of the names and addresses of the circulators and the number of part-petitions to be issued to each.<sup>45</sup> The secretary of state then places the circulator's name on the particular part-petition and keeps a record of the serial number and date of issuance of each such petition issued. Petitions circulated by anyone other than the listed solicitor will not be accepted by the secretary of state.

#### *5. Signatures to Petitions*

The constitution requires that petitions proposing constitutional amendments bear the signatures of ten per centum of the electors<sup>46</sup> and those proposing legislation, three per centum.<sup>47</sup> Upon these petitions as well as supplementary initiative petitions, it is necessary that there be the signatures of not less than one-half of the designated percentage of electors for each of one-half of the counties of the state.<sup>48</sup> The basis upon which the required number of petitioners in any case is determined is the total number of votes cast for the office of governor at the last preceding election therefor.<sup>49</sup> The clause "last preceding election" has been taken to refer to that election next preceding the filing of the petition despite the fact that the petition filed lacked sufficient signatures and a gubernatorial election occurred before the additional signatures were filed.<sup>50</sup> The effect of this ruling has been limited by a legislative directive that the secretary of state shall not accept for filing a petition which does not purport to contain at least the minimum number of signatures required.<sup>51</sup>

Each signer of a petition must be "an elector of the state."<sup>52</sup> The constitution elsewhere provides that every citizen of the Unit-

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<sup>44</sup> OHIO GEN. CODE § 4785-175.

<sup>45</sup> OHIO GEN. CODE § 4785-176a.

<sup>46</sup> OHIO CONST. Art. II, § 1a.

<sup>47</sup> OHIO CONST. Art. II, § 1b.

<sup>48</sup> OHIO CONST. Art. II, § 1g.

<sup>49</sup> *Ibid.*; OHIO GEN. CODE § 4785-182.

<sup>50</sup> *State ex rel. Ilg v. Myers*, 127 Ohio St. 171, 187 N.E. 301 (1933).

<sup>51</sup> OHIO GEN. CODE § 4785-177d.

<sup>52</sup> OHIO CONST. Art. II, § 1g.

ed States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections.<sup>53</sup> Voting privileges may, however, be limited by registration statutes so long as they are reasonable in their requirements.<sup>54</sup> In enacting legislation to implement the initiative and referendum provisions, the general assembly saw fit to employ the registration device and required that each signer be a qualified elector of the county, and a registered voter, if he resided in a registration city or precinct.<sup>55</sup> Although a person may be a qualified elector when he signs a petition his name will not be counted if he is not a voter at the time the petition is examined by the county board of elections.<sup>56</sup> A change of residence within a precinct or a correct entry on the petition of the street address coupled with a mistaken entry of the ward and precinct will not invalidate a signature.<sup>57</sup>

The constitution prescribes that the names of all signers to a petition shall be written in ink, each signer for himself, and that each signer shall place on the petition, after his name, the date of signing and his place of residence.<sup>58</sup> Residents of municipalities must note their municipality, street and number (if any), ward and precinct. Any other signer must state the township and county in which he resides. The implementing legislation requires, in addition, that the rural route or other post office address of non-municipal residents be shown.<sup>59</sup>

In one particular, legislation lessens the strictness of the process; the constitution specifies signing in ink, the statute calls for ink or indelible pencil.<sup>60</sup> This has passed muster in the courts on the theory of substantial compliance.<sup>61</sup> But it has been held that the requirements as to the date of signing, the residence of the signer and his ward or precinct are mandatory and failure to place

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<sup>53</sup> OHIO CONST. Art. V, § 1; Sections 5 and 6 of this article deny residency to the military under certain conditions, and deny the privileges of electors to idiots and insane persons.

<sup>54</sup> *State ex rel. Klein v. Hillenbrand*, 101 Ohio St. 370, 130 N.E. 29 (1920); *Daggett v. Hudson*, 43 Ohio St. 548, 3 N.E. 538 (1885).

<sup>55</sup> OHIO GEN. CODE §§ 4785-34 (1945) and 4785-177 (Supp. 1949).

<sup>56</sup> OHIO GEN. CODE § 4785-178.

<sup>57</sup> *In the Matter of Initiative Petitions*, 3 Ohio Supp. 260 (C.P. 1939).

<sup>58</sup> OHIO CONST. Art. II, § 1g.

<sup>59</sup> OHIO GEN. CODE § 4785-177 (Supp. 1949).

<sup>60</sup> OHIO GEN. CODE § 4785-176.

<sup>61</sup> *Thrallkill v. Smith*, 106 Ohio St. 1, 138 N.E. 532 (1922), *In re Referendum Petition*, 18 Ohio N.P. (N.S.) 140 (1915). A ruling by the attorney general, however, holds that signatures in black or colored pencil are invalid. 1939 Ops. Att'y Gen. (Ohio) No. 1203.

that material on the petition is fatal to the validity of the signature.<sup>62</sup> This information may, however, be written on the petition by another, at the direction and with the authority of the elector, since the mandate as to signing, "each signer for himself," is deemed to refer to the signature alone.<sup>63</sup>

One further limitation relating to signers of petitions is prescribed by statute. Each part-petition which is filed must contain signatures of electors of only one county.<sup>64</sup> The attorney general has ruled that this provision tends to facilitate the operation of the initiative and referendum and that any part-petition which bears signatures of electors of two or more counties is invalid.<sup>65</sup> This holding could be exploited to advantage by opponents of a petition by getting signatures of out-of-county electors on the petition; apparently there would be no criminal liability although the elector signed only to defeat the petition.

May one who has signed, later withdraw his signature from the petition?<sup>66</sup> Without the benefit of statute the supreme court held signers to have this privilege on referendum petitions if the withdrawal was made before official action was taken on the petition.<sup>67</sup> Any doubt was resolved by the enactment of a provision which now permits an elector to withdraw his name at any time prior to the time the part-petition bearing his signature is returned by the county board of elections to the secretary of state.<sup>68</sup> This must be done by written request to the board of elections. Further complications might be caused should an elector first withdraw his signature, then change his mind and seek to reinstate it. In a somewhat similar situation dealing with remonstrances to school district changes, the attorney general ruled that this could be done.<sup>69</sup>

#### 6. Circulation and Verification of Petitions

Solicitors must retain possession of incomplete petitions or part-petitions and may not leave them at any place for signing out

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<sup>62</sup> *In re Referendum Petition*, 18 Ohio N.P. (N.S.) 140 (1915); 1932 Ops. Att'y Gen. (Ohio) No. 4272.

<sup>63</sup> *State ex rel. Patton v. Myers*, 127 Ohio St. 95, 186 N.E. 872 (1933).

<sup>64</sup> OHIO GEN. CODE § 4785-177 (Supp. 1949).

<sup>65</sup> 1949 Ops. Att'y Gen. (Ohio) No. 783; Informal Opinion of the Attorney General (Ohio) No. 464, January 4, 1949.

<sup>66</sup> Note: 85 A.L.R. 1373 (1933).

<sup>67</sup> *State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 122 N.E. 39 (1918); but see *State ex rel. v. Lemon*, 26 Ohio N.P. (N.S.) 151 (1925).

<sup>68</sup> OHIO GEN. CODE § 4785-177a (Supp. 1949).

<sup>69</sup> 1933 Ops. Att'y Gen. (Ohio) No. 984. This opinion can, however, be distinguished as the attorney general ruled that signatures could be added on remonstrances until the final possible filing date, even if actually filed earlier.

of their presence.<sup>70</sup> It is required that any petition or part-petition left in violation of this provision be seized on behalf of the county board of elections and forwarded, with an affidavit explaining the seizure, to the secretary of state. Notice and hearing must be given the solicitor and each member of the committee for the petitioners. The statute puts the burden of proof on the solicitor and if he does not sustain it the secretary of state must destroy the petitions or part-petitions in question.<sup>71</sup>

The constitution requires that each part-petition must be verified by affidavit of the solicitor, which shall set forth (1) the "number of signers" of the part-petition; (2) that each signature was attached to the part-petition in the presence of the affiant; (3) that the signatures were attached with knowledge of the contents of the petition; (4) that each signature was entered on the date placed after it; (5) that "to the best of his knowledge and belief" each signature is genuine; and that "he believes" the signers to be electors.<sup>72</sup> This section also prescribes that "no other affidavit thereto shall be required." The form of affidavit prescribed by statute demands more of the affiant. It requires the circulator to swear positively that the signers were electors and that the signatures are of the persons whose names they purport to be.<sup>73</sup> This places a burden on the solicitor to determine as a fact the identity of a signer and his qualifications as an elector.

Defects in the affidavit will invalidate a part-petition even though all of the signatures are genuine signatures of electors. By statute a part-petition is not properly verified if the statutory form of affidavit is not properly filled out and signed; is altered by erasure or interlineation; or is false in any respect.<sup>74</sup> There is a like provision as to the case of a person signing more than once. This is rather harsh. Accidents do happen in circulating petitions and, should the circulator have two petitions on separate subjects and a signer inadvertently signed one twice, it would seem folly to invalidate the whole petition; especially if the circulator caught the error and in his affidavit reported the signatures as but one.

The courts, likewise, seem very strict in cases concerning the verification of petitions. They deem the provisions mandatory and hesitate to rely upon the doctrine of substantial compliance. Thus, in a case relating to a municipal referendum, it was held that the omission to state that the electors signed with knowledge of the contents was fatal to the validity of the petition.<sup>75</sup> And, in the days

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<sup>70</sup> OHIO GEN. CODE § 4785-176b.

<sup>71</sup> *Ibid.*

<sup>72</sup> OHIO CONST. Art. II, § 1g.

<sup>73</sup> OHIO GEN. CODE § 4785-176.

<sup>74</sup> OHIO GEN. CODE § 4785-176c.

<sup>75</sup> *The Ohio Valley Electric Railway Co. v. Hagerty*, 14 Ohio App. 393 (1921); motion to certify overruled, 19 Ohio Law Rep. 172.

when the secretary of state, rather than boards of elections, ruled upon petitions, the supreme court sustained his action in rejecting the whole document when the affidavit was false or not in part sworn to.<sup>76</sup> The attorney general has ruled that the secretary of state should reject the entire part-petition when the affidavit is unsigned by the circulator or notary.<sup>77</sup> He did not, however, consider an incorrect date on the affidavit as an invalidating irregularity.<sup>78</sup>

#### 7. Filing of Petitions; Review; Protest; Additional Signatures

All initiative and referendum petitions are filed in the office of the secretary of state.<sup>79</sup> Part-petitions must be filed at one time and all outstanding part-petitions must be invalidated and may not thereafter be accepted for filing.<sup>80</sup> A part-petition becomes void unless filed within eighteen months after the date of its issuance.<sup>81</sup> The secretary of state may not accept for filing any petition which does not purport to contain at least the minimum number of signatures required.<sup>82</sup>

In the case of a proposed constitutional amendment the secretary of state must make the submission to the voters at the next succeeding regular or general election "in any year occurring subsequent to ninety days after the filing" of the petition.<sup>83</sup> To calculate the ninety-day period referred to, the day of filing is included and the election day excluded.<sup>84</sup> It will be observed that this is the reverse of the rule followed in determining whether an act has been done *within* a period limited by law. In that situation the first day is excluded and the last counted.<sup>85</sup> The limitation is mandatory; the decision of the secretary of state is not conclusive, but subject to review by the courts.<sup>86</sup> While the constitutional section undoubtedly precludes the secretary of state from submitting an amendment at an election unless ninety days have elapsed since the filing, the attorney general has ruled that the section requires that the petition be submitted in the same year as the election and, thus, that the secretary of state may not hold the petition un-

<sup>76</sup> State *ex rel.* Gongwer v. Graves, 90 Ohio St. 311, 107 N.E. 1018 (1914).

<sup>77</sup> 1939 Ops. Att'y Gen. (Ohio) No. 1203. In a case dealing with municipal matters, it has been held that an affidavit is not defective because the notary was the attorney for the affiant and did not stamp, type or print his name under his signature. City of Gallipolis v. State *ex rel.* Houck, 36 Ohio App. 258, 173 N.E. 36 (1930).

<sup>78</sup> 1939 Ops. Att'y Gen. (Ohio) No. 1203.

<sup>79</sup> OHIO CONST. Art. II, §§ 1a, 1b.

<sup>80</sup> OHIO GEN. CODE § 4785-177c (Supp. 1949).

<sup>81</sup> OHIO GEN. CODE § 4785-177b.

<sup>82</sup> OHIO GEN. CODE § 4785-177d.

<sup>83</sup> OHIO CONST. Art. II, § 1a.

<sup>84</sup> Thraillkill v. Smith, 106 Ohio St. 1, 138 N.E. 532 (1922).

<sup>85</sup> Heuck v. State *ex rel.* Mack, 127 Ohio St. 247, 187 N.E. 869 (1933).

<sup>86</sup> Spahr v. Brown, 19 Ohio App. 107 (1925).

til the next year's general election.<sup>87</sup> He thought this interpretation necessary to give effect to the words "in any year". There was, however, another choice. The words "occurring subsequent", and so on, would, according to ordinary rules of grammar, be taken to refer to the words which immediately precede them in the sentence. The next preceding words are "in any year". Thus, we might say that the indicated election is the first regular or general election in a year which shall have begun over ninety days after the petition shall have been filed. Under this construction the process is admittedly slow but the petitioners are assured that their proposal will eventually get to the voters. The attorney general's view, on the other hand, puts the quietus on a petition if filed too late in a given year.<sup>88</sup>

An initiated legislative proposal filed not less than ten days prior to the commencement of any session of the general assembly, must be submitted to the assembly when it convenes.<sup>89</sup> It seems clear enough that the secretary of state must hold over this type of petition, if submitted less than ten days before a session, in order to submit it to the succeeding assembly.<sup>90</sup>

Once a petition has been filed, the secretary of state must separate the part-petitions by counties and transmit them to the county boards of elections of the respective counties to determine their sufficiency.<sup>91</sup> It has been determined that this requirement is not restrictive of the constitutional scheme.<sup>92</sup> In the event that part-petitions are defective, a question arises as to who shall be judge of their sufficiency. In a case involving a now-repealed section of the General Code, it was held that the secretary of state should judge the sufficiency and his decision was final so long as he did not act fraudulently or abuse his discretion.<sup>93</sup> The next assembly changed this to vest the authority in the county boards of elections, including the power "to scrutinize for the omission of any of the formal or other requirements set forth in the con-

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<sup>87</sup> 1949 Ops. Att'y Gen. (Ohio) No. 753.

<sup>88</sup> This difficulty may be overcome by the proponents of a petition by withholding the petition from filing until the first of the following year. Signatures for petitions seeking constitutional amendments may be obtained in the year preceding the year in which the petition is filed. 1913 Ops. Att'y Gen. (Ohio) No. 83. It must be noted, however, that the life span of each part-petition is only eighteen months from the date of issuance to the date of filing. OHIO GEN. CODE § 4785-177b.

<sup>89</sup> OHIO CONST. Art. II, § 1b.

<sup>90</sup> Art. II, § 1b reads in part: "When at any time, not less than ten days prior to the commencement of any session of the general assembly, . . ." (Italics ours).

<sup>91</sup> OHIO GEN. CODE § 4785-178.

<sup>92</sup> State ex rel. Herbert v. Mitchell, 136 Ohio St. 1, 22 N.E. 2d 907 (1939).

<sup>93</sup> State ex rel. Gongwer v. Graves, 90 Ohio St. 311, 107 N.E. 1018 (1914).

stitution.<sup>94</sup> Under this state of facts the supreme court held that the secretary of state was under a duty to transmit immediately the part-petitions to the county boards and would be precluded by a writ of prohibition from proceeding to hear and determine the sufficiency of petitions on file.<sup>95</sup> This has since given way to a provision that the boards shall determine "the omission of any necessary details provided by law."<sup>96</sup> The changes in the statutes were enough to cause a modification in but not the overthrow of the previous ruling. Thus, in late 1939, the supreme court held that the secretary of state could reject petitions not verified as directed by the constitution. If the signatures lost from this means decreased the total so as to be under the number required the secretary then need not transmit them to the local boards.<sup>97</sup> This decision was effective in overruling an opinion of the attorney general, given a few days earlier, which ruled that the secretary of state could invalidate all part-petitions or signatures void on their face.<sup>98</sup>

Should the secretary of state refuse to proceed after invalidating petitions ineffectively verified, the petitioners would apparently have to start over. While the constitution grants ten additional days to file "additional signatures" to petitions verified as provided for but proved to be not in all respects sufficient, the doctrine of the last cited case<sup>99</sup> would limit this grant to cases where the petitions were properly verified but the petition or certain signatures were voided for other reasons.

Should the part-petitions contain sufficient signatures even after the secretary has refused those on unverified part-petitions, the secretary must transmit them to the county boards. The boards then proceed to determine the validity of the part-petitions and signatures. The boards must ascertain whether each part-petition is properly verified.<sup>100</sup> Undoubtedly this includes the power to reject part-petitions outright, if they are, on their face, unverified because of the omission of the signature of the notary or circulator.<sup>101</sup> But the power to reject part-petitions goes further than this.

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<sup>94</sup> 113 Ohio Laws 307.

<sup>95</sup> *State ex rel. McCrehen v. Brown*, 108 Ohio St. 454, 141 N.E. 69 (1923).

<sup>96</sup> OHIO GEN. CODE § 4785-178.

<sup>97</sup> *State ex rel. Herbert v. Mitchell*, 136 Ohio St. 1, 22 N.E. 2d 907 (1939); but see OHIO GEN. CODE § 4785-7 (Supp. 1949) which says it shall be the duty of the secretary of state "to determine the sufficiency of all initiative and referendum petitions on state questions . . . as hereafter provided."

<sup>98</sup> 1939 Ops. Att'y Gen. (Ohio) No. 1203.

<sup>99</sup> *State ex rel. Herbert v. Mitchell*, 136 Ohio St. 1, 22 N.E. 2d 907 (1939).

<sup>100</sup> OHIO GEN. CODE § 4785-178.

<sup>101</sup> This would be occasioned only if the petition slipped through the secretary of state as he also has such authority by reason of the Mitchell Case. See note 95, *supra*.



The boards may reject them for falsified affidavits, signatures of electors from more than one county, or omissions of any necessary details required by law. The boards have authority to administer oaths, issue subpoenas, summon witnesses and compel the production of documents in conducting investigations.<sup>102</sup> A board likewise may reject certain signatures on otherwise valid part-petitions if those signatures are not of persons on the registration lists of a registration city, or on the polling lists of the county, or eligible to vote in the county or are not electors at the time of the board's examination.<sup>103</sup> It may further reject illegal signatures; signatures written other than in ink or indelible pencil; and signatures followed by no date or an incorrect date. It must determine any repetition or duplication of signatures.

After investigating a board must make notes opposite each rejected signature and make a report to the secretary of state indicating the sufficiency or insufficiency of the signatures and indicating whether or not each part-petition is properly verified.<sup>104</sup>

Any circulator of a particular part-petition, any signature on which or the verification of which has been declared insufficient or which is held to be not verified by a county board, may protest the board's findings.<sup>105</sup> The protest may be filed by the interested committee or any elector, as well. There is no expressed grant of the right of protest against action invalidating petitions or parts thereof for other causes. Should such a protest as is permitted be filed, the board must proceed to test its findings by bringing an action in the common pleas court of the county within three days after the filing of the protest. A judge of the court hears the action and certifies his decision to the board. The latter returns only the verified signatures and part-petitions to the secretary of state, including therewith the report of the board. These materials must be returned not less than fifty days before the election except that for petitions initiating legislation, the board shall "promptly check and return" the petitions and report.

The chronology relating to protests seems somewhat confused. The constitution provides that petitions and signatures upon such petitions, verified as provided in the constitution, shall be presumed to be in all respects sufficient, unless not later than forty days before the election, they shall be otherwise proved, and in such an event, ten additional days shall be allowed for the filing of additional signatures.<sup>106</sup> The framers, however, failed to some extent

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<sup>102</sup> OHIO GEN. CODE § 4785-179b (Supp. 1949).

<sup>103</sup> OHIO GEN. CODE § 4785-178.

<sup>104</sup> *Ibid.*

<sup>105</sup> OHIO GEN. CODE § 4785-179 (Supp. 1949).

<sup>106</sup> OHIO CONST. Art. II, § 1g. This forty-day provision was applied in *State ex rel. Vail v. Fulton*, 97 Ohio St. 325, 120 N.E. 140 (1917).

in making these provisions self-executing by not providing a method whereby the petitions or signatures could be proved insufficient. This section would, however, stop an opponent of a petition from protesting a signature immediately before an election and thus throwing a monkey wrench into the whole proceedings. It relates simply to proving matters insufficient and it could not, therefore, preclude a protest by a circulator objecting to a board's ruling a signature insufficient. Moreover, under the definition of "so verified" used in the *Mitchell* case,<sup>107</sup> it would not even stop an outsider protesting the day before the election on the ground that the part-petitions were improperly verified.

The statutes set no express time limits within which protests must be filed. One may, however, be implied from the general arrangement of the section dealing with protests. This section<sup>108</sup> provides, in the following order, for (1) the right of protest, (2) a court action, (3) submission to the secretary of state and his announcement of the sufficiency or insufficiency of the whole petition, and (4) an extension of ten days in which to file valid signatures. It could be implied therefrom that all rights of protest cease upon the notification by the secretary of state.

On the other hand, the statutes calls for no notice to the committee, circulator, or general public until the notification mentioned above is given. Without notification of the board's findings, how may we properly expect anyone to be able to take advantage of the right to protest?

One further possible interpretation, with respect to constitutional amendment, supplemental, or referendum petitions lies in the fact that the "properly verified part-petition" (certified so by the court) shall be returned to the secretary of state not less than fifty days before the election. This might be construed to defeat any protest submitted later than the aggregate period needed for the board to commence an action in the court, and for the court's decision and certification plus a span of fifty days.

If the petition should be found insufficient because of an insufficient number of valid signatures, the committee must be notified and is allowed ten additional days after notification for the filing of additional signatures.<sup>109</sup> This ten-day provision does not relate to petitions which on their face do not purport to contain

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<sup>107</sup> 136 Ohio St. 1, 22 N.E. 2d 907 (1939). See note 95, *supra*.

<sup>108</sup> OHIO GEN. CODE § 4785-179 (Supp. 1949).

<sup>109</sup> OHIO CONST. Art. II, § 1g; OHIO GEN. CODE § 4785-179 (Supp. 1949). This provision does not apply when a defect in a part-petition operates to reduce the number of counties represented on the petition to a number less than that required by Section 1g of Art. II. 1950 Ops. Att'y Gen. (Ohio) No. 1419.

sufficient signatures, for these are not even accepted for filing.<sup>110</sup> Apparently in such a case the committee would not be limited, except indirectly, in obtaining additional signatures. Where, however, a petition purports to contain sufficient signatures, but does not because of rejections by the county boards of elections, or the courts, the ten-day extension provision applies.

The requirements as to the filing of additional signatures follow the pattern of the original petition. The secretary of state, upon request of the committee, issues new part-petitions for the obtaining of new signatures.<sup>111</sup> No signature on a "supplemental part-petition,"<sup>112</sup> which is the same as a signature on an original part-petition, may be counted. The properly-verified original part-petitions and the new supplemental petitions which appear to the secretary of state to be properly verified are forwarded to the county boards of elections for determination of the validity and sufficiency of the new part-petitions. These must be returned to the secretary of state within five days. No provision authorizes review of the board's findings either by the secretary of state or the courts. Upon receipt of the county board's reports, the secretary of state must determine the total number of signatures to the petition which he shall record and announce. Should they be sufficient, then such amendment, proposed law, or law, shall be placed on the ballot as required by law.<sup>113</sup> Should the petition be found insufficient, the committee must be so notified and their only apparent recourse would be to start all over again.

#### 8. *Submission to the General Assembly*

As mentioned earlier, initiated legislation in Ohio must first be submitted to the general assembly. The direct initiative does apply at the constitutional level; proposed amendments are placed directly on the ballot.

If a sufficient petition is filed with the secretary of state not less than ten days prior to the commencement of any session of the general assembly, the secretary of state must transmit it to

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<sup>110</sup> OHIO GEN. CODE § 4785-177d.

<sup>111</sup> OHIO GEN. CODE § 4785-177c (Supp. 1949).

<sup>112</sup> So called in OHIO GEN. CODE § 4785-179 (Supp. 1949), but this should not be confused with petitions to submit laws to the people after the general assembly has refused to enact an initiated proposal. As to this limitation, a question might arise should an elector sign the original petition and then the "supplemental" petition after his original signature was rejected for lack of proper verification, for example.

<sup>113</sup> OHIO GEN. CODE § 4785-179 (Supp. 1949). The failure of the section to mention submission of a proposed law to the general assembly was apparently an inadvertence.

the general assembly as soon as it convenes.<sup>114</sup> The initiated measure is certified as being sufficient to the assembly and is there formally introduced by one of the members; usually by the speaker as a house bill. Neither the constitution nor statutes deal specifically with legislative procedure on initiated proposals, but the assembly generally treats them as if introduced by an individual member. Once the bill is submitted, the committee favoring the adoption of the proposal loses its semi-official status and has no more right to lobby for the bill or explain its merits than does any ordinary citizen.

Should the bill receive favorable attention of the assembly and pass either as petitioned for or in amended form, it is subject to veto by the governor<sup>115</sup> and to independent referendum by the electors.<sup>116</sup>

If the bill is not passed, or if no action is taken thereon within four months from the time of receipt by the general assembly, or if passed in amended form, the original proposal may be placed on the ballot if sufficient supplemental petitions are properly filed.<sup>117</sup> But the attorney general has ruled that the assembly is not precluded from considering an initiated bill because more than four months have elapsed since it was received.<sup>118</sup>

In order to demand the submission of the proposal to the voters supplementary petitions verified as were the original petitions and signed by not less than three per centum of the electors, in addition to those signing the original petition, must be filed with the secretary of state.<sup>119</sup> The supplementary petition may propose the law either as first petitioned for or with any amendment or amendments which may have been added by either or both branches of the general assembly.<sup>120</sup> There seems to be no

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<sup>114</sup> OHIO CONST. Art. II, § 1b. The use of the word "any" would seem to support the holding over of such petitions from one session until the next. One serious limitation on the word "any" might exist with respect to special sessions. OHIO CONST. Art. III, § 8 provides that special sessions shall be called by the governor and no business shall be transacted at such session except that named in the governor's proclamation or subsequent proclamation or message or provision for the expenses of the session or other matters incidental thereto.

<sup>115</sup> OHIO CONST. Art. II, § 16 provides in part: "Every bill passed by the general assembly shall, before it becomes law, be presented to the governor for his approval." In the initiative sense a bill vetoed by the governor would hardly have been finally passed.

<sup>116</sup> OHIO CONST. Art. II, § 1b. This provision, as distinguished from a carry-through election on an initiated measure, would, no doubt, be defeated should the assembly amend the proposal by adding an emergency clause.

<sup>117</sup> OHIO CONST. Art. II, § 1b.

<sup>118</sup> 1933 Ops. Att'y Gen. (Ohio) No. 903.

<sup>119</sup> OHIO CONST. Art. II, § 1b.

<sup>120</sup> *Ibid.*

provision limiting the supplementary petition procedure to the original sponsors. Should they decide to step out any other group could, apparently, carry on from that point. However, should the second group succeed in its task, controversy might arise as to which group would be entitled to prepare the arguments in support of the measure.<sup>121</sup>

If the assembly should pass the proposal in amended form, the filing of a supplementary petition would prevent the enacted bill from becoming effective until the version proposed in the supplementary petition was rejected at the polls.<sup>122</sup> In that situation, the supplementary petition would have the features both of the initiative and of the referendum. Should the bill as enacted in amended form contain an emergency clause, it is doubtful that it would be subject to the referendum as such,<sup>123</sup> but the same would hardly be true as to the referendum features of a supplementary petition, else the basic design of ultimate electoral action on an initiated measure could be defeated.

Most of the formalities and procedures relating to an original petition govern supplementary petitions. In some respects, however, such procedures are not fitted to the supplementary petition, and in others, express contrary provisions govern. It might be questioned whether those invoking the supplementary petition procedure need always file with the attorney general a synopsis and one-hundred signature petition. The section requiring those relates only to "initiative" or "referendum" petitions.<sup>124</sup> It is doubtful if these words are to be strictly construed, however, since most of the sections<sup>125</sup> use this language, or the even looser word, "petition." In one situation, however, such a requirement seems superfluous; that is, where the measure to be submitted is the same as proposed to the general assembly and the committee wishes to use a synopsis, already certified as fair and truthful by the attorney general. In an opinion concerned with a similar statute the attorney general ruled that a previously-certified synopsis might be used on a supplementary petition without a new certification when the supplementary petition proposed the same, and not an amended measure.<sup>126</sup> In other instances this requirement has as much merit as when applied to the original petitions; for

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<sup>121</sup> See page 517, *infra*.

<sup>122</sup> OHIO CONST. Art. II, § 1b.

<sup>123</sup> OHIO CONST. Art. II, § 1d.

<sup>124</sup> OHIO GEN. CODE § 4785-175.

<sup>125</sup> OHIO GEN. CODE §§ 4785-175 through 4785-182.

<sup>126</sup> 1927 Ops. Att'y Gen. (Ohio) No. 235. The statute then provided that petitioners "may submit" to the attorney general a synopsis of a proposed law.

example, when the proposal to be submitted is an amended version of the original.

The requirements as to printing, forms, circulators, signatures and circulation and determination of sufficiency are generally the same as with the original petitions. The form is varied to a slight extent by inserting the word "supplementary" before the word "initiative" in the title of the petition or part-petition.<sup>127</sup> Once again ten days are given to file additional signatures should a supplementary petition be found insufficient because of rejections of signatures or part-petitions.<sup>128</sup>

The times of filing prescribed for supplementary petitions are, of course, different from those for the original petition. To be effective a supplementary petition must be filed with the secretary of state within ninety days after the proposed law shall have been rejected by the general assembly or after the expiration of a term of four months during which no action was taken on the proposal or after the law as passed by the assembly has been filed with the secretary of state by the governor.<sup>129</sup> It has been held that a motion to postpone a bill indefinitely amounts to action on and a rejection of a bill for present purposes.<sup>130</sup> Where the assembly has adjourned without taking definite action on a bill the adjournment will be treated as a rejection and the ninety-day period will commence at that date.<sup>131</sup> The secretary of state initially decides if a petition was timely filed, but the ninety-day time limit is mandatory, of course, and an error in computation is subject to judicial correction.<sup>132</sup>

### 9. Information to the Electors

The constitution contemplates that the electors be "briefed", as it were, on initiated proposals which are to appear on the ballot. The information to be distributed consists of a true copy of a proposed law or proposed amendment to the constitution and arguments or explanations, or both, for and against the proposal.<sup>133</sup>

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<sup>127</sup> OHIO GEN. CODE § 4785-176.

<sup>128</sup> OHIO GEN. CODE § 4785-179. In such an instance, the legislative terminology becomes confusing since the section calls the additional signatures petition a supplemental petition. Thus one can file a supplemental petition to a supplemental petition.

<sup>129</sup> OHIO CONST. ART. II, § 1b.

<sup>130</sup> *Spahr v. Brown*, 19 Ohio App. 107 (1925); 1925 Ops. Att'y Gen. (Ohio) p. 134; see also Rule 100, Rules of the Senate of the Ninety-Eighth General Assembly of Ohio (1949).

<sup>131</sup> *Pfeifer v. Graves*, 88 Ohio St. 473, 104 N.E. 529 (1913).

<sup>132</sup> *Spahr v. Brown*, 19 Ohio App. 107 (1925).

<sup>133</sup> OHIO CONST. ART. II, § 1g. This provision was held to be self-executing. *State ex rel. Hunt v. Hildebrand*, 93 Ohio St. 1, 112 N.E. 138 (1915). Presumably, this does not require the secretary of state to issue copies of the law

The committee named in an initiative petition may prepare the arguments or explanations, or both, in favor of the measure proposed. The person or persons to prepare the statements against the proposal must be named by the general assembly, if in session; otherwise, by the governor.<sup>134</sup> The arguments or explanations, or both, must not exceed three hundred words for each side, and they must be filed at least sixty days before the date of the election.<sup>135</sup> There is no requirement that the accuracy of the statements be certified by any public officer. Unlike the expository statements required by statute for the benefit of prospective petition signers, this matter is argumentative. Should a statement contain slanderous remarks, it is doubtful that its authors would be liable.<sup>136</sup>

When the secretary of state receives any proposed law or constitutional amendment which would levy any tax or necessitate any expenditure of state funds, he must request of the tax commissioner an estimate of any prospective annual expenditure of public funds and the annual yield of any proposed tax.<sup>137</sup> The tax commissioner must then prepare the estimate. The original is filed with the secretary of state. From it copies are made to be distributed with the publicity pamphlet discussed below.

The constitution requires the secretary of state to cause the proposed law or amendment and the statements to be printed and to mail or otherwise distribute these materials to each of the electors of the state, as far as may be reasonably possible.<sup>138</sup> Implementing legislation provides that the secretary of state shall, at least thirty days before the election, cause these materials and a form of the official ballot, which is to be used, to be printed in

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or provision to be amended, but rather to issue copies of the proposed amendment. See 1940 Ops. Att'y Gen. (Ohio) No. 2275.

<sup>134</sup> The general wording of Art. II, § 1g is broad enough to require that arguments be prepared against proposed constitutional amendments but the section makes no provision for their preparation. Under a former statute the attorney general ruled that there was no authorization for the preparation of such arguments. 1915 Ops. Att'y Gen. (Ohio) No. 867. While this statute has been amended, it is doubted that it affects this ruling. See OHIO GEN. CODE § 4785-180a.

<sup>135</sup> OHIO CONST. Art. II, § 1g; OHIO GEN. CODE § 4785-180a.

<sup>136</sup> *Bigelow v. Brumley*, 138 Ohio St. 574, 37 N.E. 2d 584 (1941). Bettman, J., observed, *obiter*, that the governor, secretary of state and the official authors are absolutely privileged if the remarks objected to are pertinent to the occasion. The holding of the court was that if there be such a privilege, it does not extend to an outsider alleged to have conspired with the official appointees to defame the plaintiff.

<sup>137</sup> OHIO GEN. CODE § 4785-175a.

<sup>138</sup> OHIO CONST. Art. II, § 1g. It has been ruled that this duty is mandatory though the secretary is not instructed as to the details of the operation. 1927 Ops. Att'y Gen. (Ohio) No. 1073.

pamphlet form and must, at least twenty days before the election, mail or otherwise distribute the pamphlets, charges fully paid.<sup>139</sup> All costs of printing and distributing these pamphlets are paid by the state from its general revenue fund.<sup>140</sup>

#### 10. *Submission to the Electors — Ballot*

When a sufficient initiative or supplementary petition has been properly filed the secretary of state must submit the proposal to the electors.<sup>141</sup> The secretary of state will not be enjoined from submitting a proposal because it might be inconsistent with the federal or state constitutions,<sup>142</sup> and should he attempt to withhold a proposal from the people, mandamus will lie to compel him to submit the measure.<sup>143</sup> He is plainly not concerned with substance in the policy sense. It seems equally clear that he is not concerned with the question whether the proposal is inconsistent with any general limitation on legislative power such as constitutional guaranties of civil liberties. That is the province of the judiciary in proper cases instituted after the positive enactment. What, however, of limitations addressed specifically to the initiative, such as the ban on the single tax? May not the secretary of state properly maintain that he is under no duty to submit a proposal as to a subject which the constitution places beyond reach of the initiative? Or is his function simply the ministerial business of submitting any proposal which measures up in terms of procedure, technical form and signatures?

The amendment or law proposed by the petition must be submitted in its original form unless, in the case of a proposed law, the supplementary petition proposes the law with one or more of the amendments made by either house of the general assembly. The only proposal which the constitution requires to be submitted is that which appears on the petition and the constitution permits no other to be submitted.<sup>144</sup>

The secretary of state has the duty of preparing the ballots.<sup>145</sup> While, as stated above, an initiated petition may propose two or

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<sup>139</sup> OHIO GEN. CODE § 4785-180b.

<sup>140</sup> OHIO GEN. CODE § 4785-180c.

<sup>141</sup> OHIO CONST. Art. II, §§ 1a and 1b.

<sup>142</sup> *City of Cincinnati v. Hillenbrand*, 103 Ohio St. 286, 133 N.E. 556 (1921); *Weiland v. Fulton*, 99 Ohio St. 10, 121 N.E. 816 (1918); *Pfiefer v. Graves*, 88 Ohio St. 473, 104 N.E. 529 (1913).

<sup>143</sup> *State ex rel. Marcolin v. Smith*, 105 Ohio St. 570, 138 N.E. 881 (1922).

<sup>144</sup> *State ex rel. Greenlund v. Fulton*, 99 Ohio St. 168, 187, 124 N.E. 172 (1919).

<sup>145</sup> OHIO CONST. Art. II, § 1g provides in part: "Unless otherwise provided by law, the secretary of state shall . . ." The general assembly has not seen fit to change this, but rather implements the provision by Section 4785-181 of the General Code.



more unrelated constitutional amendments or statutory sections, it is less clear whether such proposals may be combined on the ballot. Article II, Section 1g, provides that the secretary of state shall "cause the ballots so to be printed as to permit an affirmative or negative vote upon each law, section of law, or item in a law appropriating money, or proposed law, or proposed amendment to the constitution." It has been held that a revised municipal home rule charter may be submitted as a whole with the voter having but one vote either for or against it.<sup>146</sup> Certainly two or more sections may be amended by unitary submission if there is but one fundamental change and the amending of the two or more sections relates to but a single plan.<sup>147</sup> However, the supreme court has said that two unrelated amendments must be so arranged on the ballot as to permit the individual voter to voice his approval of each section separately.<sup>148</sup> This compromise seems logical, but the real problem is who is to say amendments are unrelated, or are parts of a single plan? It would appear that the initial decision is up to the secretary of state. Whether or not the courts would review such a decision is problematical; we are inclined to the view that they would.

Initiated proposals appear on a separate ballot, designated "Official Questions and Issues Ballot", and state and local questions are grouped and arranged so that state questions appear at the top, county next, municipal next, township next and school district at the foot.<sup>149</sup> Within this pattern the secretary of state decides the order of listing of state questions.<sup>150</sup>

On the "Official Questions and Issues Ballot" the printed matter relating to each issue must be enclosed at the top and bottom by a heavy horizontal line. Below each top line must appear a brief title descriptive of the issue, such as "Proposed Constitutional Amendment," or "Proposed Increase in Tax Rate." Following the title must be a brief statement of the percentage of affirmative votes necessary for the passage of the measure. Next in order comes the "text describing the question or issue."<sup>151</sup> The statute provides that the "ballot title" of an initiated proposal shall be determined by the secretary of state but the person or committee sponsoring the measure may suggest a title which is

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<sup>146</sup> *Reutener v. Cleveland*, 107 Ohio St. 117, 141 N.E. 27 (1923).

<sup>147</sup> Resort has been made to this system quite often in the past. See, e.g., *Ohio Election Statistics for General Election Held on the Second Day of November 1948*, page 433 (Two sections of two articles in the constitution were amended by single vote).

<sup>148</sup> *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 176 N.E. 664 (1931).

<sup>149</sup> OHIO GEN. CODE § 4785-103 (Supp. 1949).

<sup>150</sup> OHIO GEN. CODE § 4785-181.

<sup>151</sup> OHIO GEN. CODE § 4785-103 (Supp. 1949).

to be given full consideration.<sup>152</sup> The secretary of state is instructed to prepare a true and impartial title, which would be unlikely to create prejudice for or against the proposal.

Much controversy has arisen over the meaning of the phrase "text describing the question or issue" and its statutory predecessor, "in language sufficient to clearly designate it." In the case of *State ex rel. Greenlund v. Fulton*,<sup>153</sup> it was declared that a submission of a proposed amendment to the constitution without substantial compliance with the provisions of the initiative and referendum sections of the constitution was invalid. It was not this innocuous statement that has created confusion, but rather the lack of a clear majority rationalization. The case has been cited as standing for the proposition that in the submission of a state initiative proposal to the voters the exact language of the proposal must be printed on the ballot.<sup>154</sup> Actually, the supreme court has limited this theory to initiative and referendum measures on state constitutional questions.<sup>155</sup> In both instances, however, it was dealing with local matters and, as yet, has not definitely held that the proposition does not apply to initiated legislation. Short of printing the complete text of a proposal, it seems clear that all the essential elements or changes must be described on the ballot.<sup>156</sup>

This text must be placed on the right side of the ballot, beneath the short title, and on the left there must be four enclosed rectangular spaces.<sup>157</sup> Each space is arranged in the general shape of a square or rectangle. In the space at the top right must appear the word "yes", while the word "no" is to appear in the space just below. The two spaces at the extreme left are provided for the marking of the ballot. The size of the spaces for affirmative votes and those for negative votes must be the same.

The submitting of these issues to the voters generally follows the ordinary election procedures with but a few variations. A committee which advocates or opposes a measure may appoint a challenger and a witness to the count in each precinct.<sup>158</sup> This procedure is handled on a county basis although the committee need not be a local committee. In order to obtain this privilege, the committee, acting in good faith, must file a petition with the county board of elections not later than five days prior to the election. Should more than one committee file, the board must

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<sup>152</sup> OHIO GEN. CODE § 4785-181.

<sup>153</sup> 99 Ohio St. 168, 124 N.E. 172 (1919).

<sup>154</sup> *Reutener v. Cleveland*, 107 Ohio St. 117, 132, 141 N.E. 27 (1923).

<sup>155</sup> *Ibid*; *Prosen v. Duffy*, 152 Ohio St. 139, 87 N.E. 2d 342 (1949).

<sup>156</sup> *State ex rel. Greenlund v. Fulton*, 99 Ohio St. 168, 124 N.E. 172 (1919).

<sup>157</sup> OHIO GEN. CODE § 4785-103 (Supp. 1949).

<sup>158</sup> OHIO GEN. CODE § 4785-120.

decide and announce its decision by registered mail to each committee not less than three days preceding the election. This decision is not final; the aggrieved party may institute mandamus in the common pleas court of the county to compel the board to accept the appointees of such party. If more than three questions are submitted, the various committees may agree upon the appointees so that not more than six challengers and six witnesses will represent each side of all issues. If the committees cannot so agree, the judges of elections must make the appointment so that in no case will there be more than six challengers and six witnesses appointed for any one election in any one precinct.

The general election laws provide the usual methods for protests of elections on issues, for announcements of results, proclamations, and certificates.

The constitution expressly validates a proposed amendment or law which has been submitted to the electors and received an affirmative majority notwithstanding any insufficiency of the petitions by which the submission was procured.<sup>159</sup> It is to be noted that this applies simply to defects in petitions; it does not purport to obviate failure to comply with other constitutional provisions, such as those pertaining to the submission of initiated proposals.<sup>160</sup>

### 11. *Effective Date*

Any proposed law or amendment to the constitution submitted to the electors, if approved by a majority of the electors voting thereon, takes effect thirty days after the election at which it was approved.<sup>161</sup> While there is no apparent method of changing the technical effective date, the practical effective date could, no doubt, be delayed by inserting a clause in the proposed measure which specified a later date for its provisions to become operative. Thus, a tax measure might provide for the levy to become applicable the first day of the succeeding calendar year.

As mentioned above, when the general assembly has enacted a proposal in amended form the effective date is suspended by the filing of a supplementary petition. Only the law as proposed in the supplementary petition goes on the ballot for approval or rejection. Should that measure be rejected, the law as enacted would go into effect immediately.<sup>162</sup> If, however, a majority of those voting on the submitted proposal should approve the measure, the legislative act would become a nullity, and the sub-

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<sup>159</sup> OHIO CONST. Art. II, § 1g. See also OHIO GEN. CODE § 4785-182.

<sup>160</sup> See, e.g., State *ex rel.* Greenlund v. Fulton, 99 Ohio St. 168, 124 N.E. 172 (1919).

<sup>161</sup> OHIO CONST. Art. II, § 1b.

<sup>162</sup> *Ibid.*

mitted measure would become effective as the law thirty days after the election.

### 12. *Conflicting Proposals*

The constitution provides that should two conflicting proposed laws or amendments be submitted at any one election, the one receiving the highest number of affirmative votes shall be the law or amendment adopted.<sup>163</sup> Apparently, no one has standing to keep a measure from being submitted to the people because it duplicates or conflicts with another measure to be submitted. The reference to laws and amendments rather than conflicting portions thereof, could conceivably kill off a complete law by force of a conflict between one of its sections and a section of an almost entirely unrelated law or amendment.

Another difficulty would be encountered should two proposals be made to amend one constitutional or statutory section. Article II, Section 16, of the constitution provides: "No law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended." While this section applies only to statutory material, it was indirectly used to support the theory that in Ohio when the whole revised text of a constitutional provision is approved the old unchanged portions are also passed upon by the assembly or, in case of an election, the voters.<sup>164</sup> This theory was extended by ruling, in effect, that where two amendments to one constitutional section were proposed, even if the changes were consistent with each other, if one or both of the amendments were drafted so as to contain the entire section revived the proposals would be inconsistent and one must fail. Perhaps this result could be avoided as to constitutional amendments, by petitioning only for the changes rather than a revised section. It may be doubted, however, that this could be done as to initiated bills, as it might be held that the pertinent clause of Article II, Section 16, applies to them in view of the provision that the limitations on the power of the general assembly to enact laws shall be deemed limitations on the power of the people to enact laws.<sup>165</sup>

This inconsistency provision has also been said to apply to conflicts between amendments proposed by the initiative and the general assembly.<sup>166</sup>

While it would be incongruous to permit the governor to veto any direct action of the people, the constitution singles out in-

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<sup>163</sup> *Ibid.*

<sup>164</sup> *State ex rel. Greenlund v. Fulton*, 99 Ohio St. 168, 124 N.E. 172 (1919).

<sup>165</sup> OHIO CONST. Art. II, § 1.

<sup>166</sup> *State ex rel. Greenlund v. Fulton*, 99 Ohio St. 168, 124 N.E. 172 (1919).

initiated laws and expressly provides that they shall not be subject to such veto.<sup>167</sup>

### 13. Amendment and Repeal of Popular Legislation

May an initiated measure enacted by the electors later be amended or repealed by the general assembly?<sup>168</sup> Strong policy arguments can be made on either side of this question. While there is no authoritative ruling on it at the state level, cases which arose in the municipal sphere are suggestive. In non-charter municipalities the initiative and referendum are governed by general statute. This has been interpreted to leave the local governing body with power to repeal an amended ordinance.<sup>169</sup> While the statutes providing for the initiative on a local basis differ considerably from the provisions for the statewide initiative, neither deals specifically with our problem, and it seems safe to assume that the general assembly may repeal or amend initiated laws. A municipality is free to regulate the subject by home rule charter<sup>170</sup> and in this way could assure the voters the last word on a particular measure.<sup>171</sup> The question does not exist as to initiated amendments since all constitutional amendments, whether proposed by convention, initiative or the general assembly, must clear through the people. In Ohio, only two laws have been enacted by means of a supplemental initiative petition. The first of these related to aid to the aged.<sup>172</sup> Apparently the assembly never doubted its authority to change this act for it has since added sections and amended or repealed original sections.

### REFERENDUM

In framing referendum provisions, the Constitutional Convention of 1912 chose the optional-type referendum.<sup>173</sup> In one area—that relating to the power of the general assembly to authorize associations with banking powers—compulsory referendum had been exacted by the Constitution of 1851.<sup>174</sup> Similarly, consti-

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<sup>167</sup> OHIO CONST. Art. II, § 1b. Apparently this is done to overcome any doubt in the particular area, since legislative acts are the only ones expressly made subject to the veto. See OHIO CONST. ART. II, § 16.

<sup>168</sup> See Note 97 A.L.R. 1046 (1935).

<sup>169</sup> *State ex rel. Singer v. Cartledge*, 129 Ohio St. 279, 195 N.E. 237 (1935); 1933 Ops. Att'y Gen. (Ohio) No. 19.

<sup>170</sup> *State ex rel. Daniels v. City of Portsmouth*, 136 Ohio St. 15, 22 N.E. 2d 913 (1939).

<sup>171</sup> See, e.g., Section 48 of the Charter of the City of Columbus, Ohio, which provides that the city council may not amend or repeal an ordinance adopted by the voters for a period of two years after its passage.

<sup>172</sup> OHIO GEN. CODE §§ 1359-1 *et seq.*, as adopted by initiative November 7, 1933.

<sup>173</sup> OHIO CONST. Art. II.

<sup>174</sup> OHIO CONST. Art. XIII, § 7.

tutional amendments proposed by the assembly or constitutional conventions must be submitted to the voters.<sup>175</sup> The provision relating to associations with banking powers is obsolete; "banking powers" has been interpreted to apply only to powers employed in making or issuing paper money or, at most, to the powers exercised by banks of issue.<sup>176</sup> In our present national system of banking and currency, there is no place for state bank notes serving as a circulating medium.

No express provision of the constitution authorizes the voluntary referendum, whereby the legislature voluntarily submits an act to the people. It has been held that except for the provisions relating to the initiative and referendum, all legislative authority must be exercised by the general assembly alone.<sup>177</sup> The general assembly may not delegate to any other body or to the public directly the power to pass laws.<sup>178</sup> Local option laws are a well-rooted exception to this general principle.<sup>179</sup>

The referendum, with which we are concerned, is the optional plan.

The constitution reserves two powers of referendum to the voters of Ohio. The optional referendum is made applicable to the action of the general assembly in ratifying any proposed amendment to the Constitution of the United States.<sup>180</sup> This provision has been a dead letter since the Supreme Court of the United States decided that the federal constitution, in providing for ratification by the legislatures of the states, means action by representative assemblies and not the electors.<sup>181</sup>

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<sup>175</sup> OHIO CONST. Art. XVI.

<sup>176</sup> *Dearborn v. Northwestern Savings Bank*, 42 Ohio St. 617 (1885); *Fordham, Some Aspects of Constitutional Revision in Ohio*, 23 OHIO BAR 181, 189 (1950).

<sup>177</sup> *State ex rel. Bryant v. Akron Metropolitan Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929). See Note 76 A.L.R. 1053 (1932) on the problem of whether a referendum may be permitted on a general statute in the absence of a constitutional authorization.

<sup>178</sup> *State ex rel. Godfrey v. O'Brien*, 95 Ohio St. 166, 115 N.E. 25 (1917); *State ex rel. Allison v. Garver*, 66 Ohio St. 555, 64 N.E. 573 (1902); *Railway v. Commissioners*, 1 Ohio St. 77 (1852).

<sup>179</sup> *Gassman v. Kerns*, 7 Ohio N.P. (N.S.) 626 (C.P. 1908), *affirmed* in 81 Ohio St. 496 (Mem. 1909); *Ely v. Williard*, 2 Ohio N.P. (N.S.) 571 (C.P. 1904).

<sup>180</sup> OHIO CONST. Art. II, § 1.

<sup>181</sup> *Hawke v. Smith*, 253 U.S. 221 (1920). This doctrine was extended to preclude a referendum on an act of the general assembly calling a convention for the purpose of deciding upon the ratification of a proposed amendment to the Constitution of the United States. *State ex rel. Donnelly v. Myers*, 127 Ohio St. 104, 186 N.E. 918 (1933). But certain state acts affecting the federal sphere are subject to referendum. Thus, in *State of Ohio ex rel.*

The electors may, through the optional referendum, reject any law, section of any law or item in any law appropriating money passed by the general assembly,<sup>182</sup> except laws providing for tax levies, appropriations for the current expenses of the state, and emergency laws necessary for the immediate preservation of the public peace, health or safety.<sup>183</sup> These exceptions from the general rule, it has been said, must be construed strictly though reasonably.<sup>184</sup>

The exemption as to tax statutes has been confined in application to state tax levies which are self-executing imposts. The exemption does not apply to acts, which relate to taxation, as by regulating tax procedure or by authorizing or limiting local taxation, but do not actually impose tax levies.<sup>185</sup> Thus, an act imposing a tax limitation upon local governments and creating a taxing agency is not excepted from the referendum provisions of the constitution.<sup>186</sup> The fact, moreover, that an act contains certain sections which might be subject to referendum probably does not control as to the act as a whole.<sup>187</sup> While there are no actual decisions on the point, the attorney general has taken the view that an otherwise referable section of a measure might be subject to referendum even if combined with sections excluded from the device.<sup>188</sup> The referendum would doubtless be available as against a measure repealing a state tax. This observation is offered despite its academic ring!

With respect to the second exception, that for current expenses of the state, the court, by Robinson, J., has said, "Our conception of the phrase, as used in our constitution, is that 'current expenses', in addition to including the expenses incident to officering (*sic*) and maintaining the state government, includes the preserving in repair and maintaining of the property of the state government, and, as applied to roads, includes the maintaining and repairing thereof, as distinguished for new construc-

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Davis v. Hildebrant, 241 U.S. 565 (1916), it was held that a congressional redistricting act was referable. And see 1917 Ops. Att'y Gen. (Ohio) No. 153, wherein it was ruled that an act of the general assembly extending suffrage to women in presidential elections was subject to the referendum.

<sup>182</sup> OHIO CONST. Art. II, § 1. The referendum is limited to "laws" and bills not passed may not be referred. 1913 Ops. Att'y Gen. (Ohio) No. 248.

<sup>183</sup> OHIO CONST. Art. II, § 1d.

<sup>184</sup> State *ex rel.* Keller v. Forney, 108 Ohio St. 463, 141 N.E. 16 (1923).

<sup>185</sup> *Ibid.*

<sup>186</sup> State *ex rel.* Schrieber v. Milray, 88 Ohio St. 301, 102 N.E. 959 (1913).

<sup>187</sup> State *ex rel.* Keller v. Forney, 108 Ohio St. 463, 141 N.E. 16 (1923).

<sup>188</sup> 1943 Ops. Att'y Gen. (Ohio) No. 6207.

tion."<sup>189</sup>

In the only case in which the court was directly faced with the problem of divisibility of an act, the court held that none of its provisions were subject to the referendum. Thus, where an appropriation bill for current expenses included a condition that certain vouchers must show that competitive bids were secured, it was held that this condition was effective immediately upon the passage of the bill and would not be subject to the referendum.<sup>190</sup> While a capital outlay item in a general appropriation bill would be subject to referendum the court considered a condition attached to a current expense item a part, in effect, of that item.

An entirely different attitude of the court is seen in its construction of the third exception—that dealing with emergency laws. The constitution provides that "emergency laws upon a yea and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only by a yea and nay vote, upon a separate roll call thereon."<sup>191</sup> It will be seen that there is no specific requirement that there be a two-thirds vote on the emergency clause, but that is not a matter of moment since that quality of vote must be had on final passage.<sup>192</sup> It is the practice to have a two-thirds vote on the emergency clause before it is added to the proposed bill for final vote.<sup>193</sup> Should an emergency bill be passed by both branches of the general assembly in varied forms and neither house would accept the other's version, the second vote in each house, after a conference committee had ironed out the differences, would again be subject to a two-thirds majority.<sup>194</sup>

The real difficulty encountered with respect to this exception is whether a legislative determination of an emergency is justiciable. In the first case in which this question could have been answered, the supreme court simply held that the reasons given for declaring the Conservancy Act to be an emergency measure

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<sup>189</sup> *State ex rel. Janes v. Brown*, 112 Ohio St. 590, 601, 142 N.E. 37 (1925). The attorney general has ruled that the costs of construction of a building for women at a state university cannot be deemed to be current expense. 1919 Ops. Att'y Gen. (Ohio) No. 308.

<sup>190</sup> *State ex rel. The Davies Manufacturing Co. v. Donahey*, 94 Ohio St. 382, 114 N.E. 1037 (1916).

<sup>191</sup> OHIO CONST. Art. II, § 1d.

<sup>192</sup> But see 1915 Ops. Att'y Gen. (Ohio) No. 159 to the effect that there must be a separate two-thirds vote for an emergency clause.

<sup>193</sup> See, e.g., Rule 63, Rules of the Senate of the Ninety-Eighth General Assembly of the State of Ohio (1949).

<sup>194</sup> Rule 16, Joint Rules of the Ninety-Eighth General Assembly of the State of Ohio (1949).



were valid.<sup>195</sup> Shortly thereafter the court by dictum, carried into the syllabus, stated that the emergency character of an act could be challenged "in a proper proceeding and at a proper time."<sup>196</sup> When first directly faced with the problem, the court split into three camps.<sup>197</sup> Two members believed that if the legislative formalities required were met, the determination of an emergency by the assembly would be conclusive. These two, joined by two others, were of the opinion that if the legislative determination were not conclusive, it should be presumed valid and any repugnancy with the true situation must be obvious. In three strongly-worded dissents, the minority favored a complete examination and review of the determination of emergency. One saving element in the majority opinion (and undoubtedly approved by the minority judges) was the dictum that certain features of an emergency clause are justiciable; namely, that the necessary two-thirds vote was had, that the general assembly has set forth the reasons for such declaration,<sup>198</sup> and that the emergency clause passed upon a yea and nay vote on a separate roll call.<sup>199</sup> Sixteen years later, the court by a four-to-two vote, definitely held that the courts will not review a legislative determination of an emergency.<sup>200</sup> The court relied on the earlier case and a case<sup>201</sup> dealing with an analogous code section.

Further limitations upon the referendum power of the people might be found in the distinction between statutes purely legislative in character and those of an administrative or executive nature. No Ohio cases relating to statutes have been found. On the local level, it has been held that an ordinance fixing the rate for the furnishing of natural gas to a city, notwithstanding that it contained additional related matters concerning service, was not subject to the referendum.<sup>202</sup> As already noted, the municipal

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<sup>195</sup> *Snyder v. Deeds*, 91 Ohio St. 407, 110 N.E. 1068 (1914).

<sup>196</sup> *Miami County v. City of Dayton*, 92 Ohio St. 215, 110 N.E. 726 (1915).

<sup>197</sup> *State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 133 N.E. 457 (1921). For a review of the Ohio and other state cases on this problem, see *Comment*, 1 OHIO ST. L. J. 40 (1935).

<sup>198</sup> In an analogous case involving a municipal ordinance, it was held that failure of the council to set forth the reasons for its declaration of emergency was fatal. A mere statement that the ordinance was necessary for the preservation of public peace, health and safety was considered but a conclusion, without reasons, and not sufficient. *Goodman v. Youngstown*, 24 Ohio L. Abs. 696 (1937).

<sup>199</sup> 102 Ohio St. 591, 133 N.E. 457 (1921).

<sup>200</sup> *State ex rel. Schorr v. Kennedy*, 132 Ohio St. 510, 9 N.E. 2d 278 (1937).

<sup>201</sup> *Holcomb v. State ex rel. Coxey, Sr.*, 126 Ohio St. 496, 186 N.E. 99 (1933).

<sup>202</sup> *The Union Gas & Electric Co. v. City of Cincinnati*, 33 Ohio Law Rep. 214 (1930). It has been held that where a city has determined to construct a public utility, ordinances incidental to and in furtherance of the original measure are not subject to referendum under Section 5 of Article XVIII of

initiative and referendum are apart from home rule charter provisions, controlled by statute. Even if the Ohio courts do adopt the general theory of excluding ordinances of an administrative nature, this should not affect their holdings on state legislation. There is no more basis here than in the case of the initiative for restricting the scope of electoral action by interpretation. The statute exempting certain ordinances from the referendum is worded much differently from Section 1e of Article II.<sup>203</sup> While the constitution reserves to the electors of the state the power to adopt "any law" the provision as to municipalities reserves the power "on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action."<sup>204</sup> (italics ours).

### *Referendum Procedure*

Generally, the provisions, both constitutional and statutory, dealing with the initiative and referendum treat related features of each together. While the two systems are quite separate many of the procedural steps for the initiative apply equally to the referendum. Particular note will be taken here only of features of the referendum peculiar to that device.

The initial steps of a one-hundred signature petition, summary and certificate of that summary by the attorney general are required. A referendum petition, however, is limited to one act or part thereof.<sup>205</sup> The printing, control, and payment for petitions is handled as in the case of initiative petitions. The secretary of state may, however, refuse to issue blank petitions against laws not subject to referendum and mandamus will not lie against him.<sup>206</sup>

The form of referendum petitions is slightly different. The words "referendum petition" are placed at the top of the petition.<sup>207</sup> Unlike the initiative, the constitution requires no particular caption for referendum petitions; this gap has, however, been filled by a statute requiring that following the date of issuance of the petition must come the words, "To be submitted to the electors for their approval or rejection."<sup>208</sup> Then follows the title, which must contain a brief legislative history of the law, section or item

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the constitution. *State ex rel. Didelius v. Commissioner*, 131 Ohio St. 356, 2 N.E. 2d 862 (1936), overruling *State ex rel. Diehl, Jr. v. Abele*, 119 Ohio St. 210, 162 N.E. 807 (1928). If the later ordinances materially modified the basic one that would be another matter.

<sup>203</sup> OHIO GEN. CODE § 4227-3.

<sup>204</sup> OHIO CONST. Art. II, § 1f.

<sup>205</sup> *State ex rel. Patton v. Myers*, 127 Ohio St. 95, 186 N.E. 872 (1933).

<sup>206</sup> *State ex rel. Schorr v. Kennedy*, 132 Ohio St. 510, 9 N.E. 2d 278 (1937); *State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 133 N.E. 457 (1921).

<sup>207</sup> OHIO GEN. CODE § 4785-176.

<sup>208</sup> *Ibid.*

of law sought to be referred. The remainder of the petition follows the form of initiative petitions,<sup>209</sup> except that following the text of the law to be referred appears the certificate of the secretary of state that the law, section or item of law, as shown, has been found to be a true copy of the enrolled bill or the pertinent part of it.

The issuance of blank part-petitions to circulators and the related procedures are exactly the same as for initiative petitions.

The constitution provides that petitions seeking to have a law or part of a law referred shall bear the signatures of six per centum of the electors.<sup>210</sup> Again, it is required that there be signatures of not less than one-half of the designated percentage of electors of each of one-half of the counties in the state.

The requirements and qualifications for signers of these petitions are exactly the same as for initiative petitions. So it is with respect to the circulation and verification of petitions.

Although all part-petitions must be filed together, the provisions relating to time of filing referendum petitions are quite different from those concerning initiative petitions. To be effective referendum petitions must be filed with the secretary of state within ninety days after the law which is to be referred shall have been filed by the governor in the office of the secretary.<sup>211</sup> This time is to be computed by excluding the date upon which the law was filed in the office of the secretary of state.<sup>212</sup> Further, the date of approval by the governor is not important or effective in determining effective dates of referable statutes.<sup>213</sup> By excluding the filing day and permitting petitions to be filed at any time on the ninetieth day, the petitioners actually have ninety-plus days in which to file. One court of appeals has taken the view that should the ninetieth day be a Sunday a further day is given.<sup>214</sup>

While the constitutional provisions seem clear as to bills passed in the ordinary course and approved by the governor, there is a void as to bills passed over a veto or allowed to become law by lapse of time. Only when the governor approves a bill is he specifically required to file the bill with the secretary of state.<sup>215</sup> Yet

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<sup>209</sup> OHIO GEN. CODE § 4785-176 provides in part: "The general provisions heretofore set forth relative to the form and order of an initiative petition, shall be, so far as practical, applicable to a referendum petition . . ."

<sup>210</sup> OHIO CONST. ART. II, § 1c.

<sup>211</sup> *Ibid.*

<sup>212</sup> *Heuck v. State ex rel. Mack*, 127 Ohio St. 247, 187 N.E. 869 (1933).

<sup>213</sup> *State v. Lathrop*, 93 Ohio St. 79, 112 N.E. 209 (1915).

<sup>214</sup> *State ex rel. Mack v. Heuck*, 38 Ohio Law Rep. 33 (1933). The supreme court, in affirming, found it unnecessary to pass on this issue. *Heuck v. State ex rel. Mack*, 127 Ohio St. 247, 187 N.E. 869 (1933). *Contra*: 1927 Ops. Att'y Gen. (Ohio) No. 281.

<sup>215</sup> OHIO CONST. ART. II, § 16.

referendum petitions must be filed within ninety days after the governor has filed a bill. In the case of a bill passed over a veto it would seem logical to say that a petition could be filed within ninety days after that bill was filed with the secretary by officers of the general assembly. Since bills becoming law by lapse of time are in the hands of the governor, the burden of filing must be on him, and thus the ninety-day period would begin when he did file. While no authority can be found for these propositions, they have strong rational support. Measures not signed by the governor are not within the express exceptions to the referendum and the question here derives simply from a gap left in the drafting of the ninety-day clause.<sup>216</sup>

As with supplementary initiative petitions, used when the initiated proposal is amended and passed, the filing of a referendum petition suspends the effective date of an act to be referred.<sup>217</sup> Whether the general assembly may repeal or amend an act while in this state of suspension has not been adjudicated.<sup>218</sup> When a referendum petition attacks only part of a law, the remainder goes into effect in the regular manner. If the voters approve the measure or part, as the case may be, it takes effect when the election results are determined.<sup>219</sup>

The examination and rejection of petitions or signatures are administered in the same manner as those for the initiative.<sup>220</sup> The same is true as to protests and supplementary petitions used for the ten-day period granted to obtain additional signatures.

The provisions relating to information for the electors are the same as for initiative proposals save that the persons preparing arguments or explanations, or both, *against* a measure may be named in the petition while those preparing the material for the measure are named by the general assembly if in session, or if

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<sup>216</sup> OHIO CONST. Art. II, § 16 reads in part: "No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided . . ." Since this last clause has been held to refer to Art. II, § 1d, which exempts certain legislative acts from the referendum, *State v. Lathrop*, 93 Ohio St. 79, 112 N.E. 209 (1915), a very strict interpretation of the section would not only exclude bills passed over a veto from the referendum, but would also preclude such bills from ever becoming effective.

<sup>217</sup> Compare OHIO CONST. Art. II, § 1c with Art. II, § 1b.

<sup>218</sup> The attorney general has ruled that the assembly may amend an act after the governor has approved and before the ninety-day waiting period has elapsed, at least until a referendum has been ordered on it. 1915 Ops. Att'y Gen. (Ohio) No. 325.

<sup>219</sup> OHIO CONST. Art. II, § 1c.

<sup>220</sup> The secretary of state may, however, refuse to submit to referendum an act containing an emergency clause. 1914 Ops. Att'y Gen. (Ohio) No. 1124.

not, by the governor.<sup>221</sup> Various code sections, including the one dealing with publicity pamphlets,<sup>222</sup> call for a printing of the text of the law to be initiated or referred. In the case of the referendum, confusion may result when but a section or item of a law is attacked. For publicity pamphlets the constitution requires that the secretary of state shall cause to be printed "the law, or proposed law, or proposed amendment to the constitution."<sup>223</sup> The statute, on the other hand, requires the printing of the "text of each measure to be submitted."<sup>224</sup> Should but one section or item of a law be referred, it would be very confusing to have the whole law printed without clear identification of the part under attack. On the other hand, the reading of one section of a law, without seeing the remainder, would usually not be very enlightening. A better method, and one which would doubtless be substantial compliance, would be to print the complete act, italicizing the parts to be deleted should the referendum be successful.

The ballot is governed by the same provisions as in the case of the initiative. Referred bills are treated as initiated measures in that a "yes" vote is used to support the law. Due to the old voter's creed, "in case of doubt, vote no," this might seem inadvisable. The record of Ohio referrals might be shown to substantiate this danger; out of the ten bills referred to date, only one has been ratified. The ballot is printed so that the issue can be submitted to the voters at the next succeeding general or regular election in any year occurring subsequent to sixty days after the filing of the petition.<sup>225</sup> It will be recalled that the attorney general has interpreted a similar provision as to constitutional amendments to mean that the issue must be submitted in the year the petition is filed.<sup>226</sup> This becomes important as to a protracted session of the legislature since one hundred fifty days from July 1, for example, would carry beyond election day.

Should the voters reject a referred act designed to repeal or amend a law, that law would remain effective.<sup>227</sup>

As already noted, a referred measure does not become effective unless and until approved by the voters. There is no express provision making the veto applicable to the referendum, but it does not fit. If the governor had approved the measure the voters would simply be concurring. If the governor had failed to act or disapproved the bill he would already have had his chance and no

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<sup>221</sup> OHIO CONST. ART. II, § 1g; OHIO GEN. CODE § 4735-180a.

<sup>222</sup> OHIO GEN. CODE § 4735-180b.

<sup>223</sup> OHIO CONST. ART. II, § 1g.

<sup>224</sup> OHIO GEN. CODE § 4735-180b.

<sup>225</sup> OHIO CONST. ART. II, § 1c.

<sup>226</sup> See note 87, *supra*.

<sup>227</sup> 1915 Ops. Att'y Gen. (Ohio) No. 725.

reason can be found for giving him two chances to kill a measure.

In contrast to the initiative provision, there is no express clause dealing with conflicting provisions caused by the referendum. Such a conflict might be caused, for example, by two petitions, one of which referred section one of an act and the other referred sections one and two. Should the first submission be approved, the voters would be expressing a desire that section one be the law; should the second submission be rejected the voters would be saying that section one should not be the law.

#### CONCLUSION

In a paper of this character it behooves the authors to leave the reader to draw his own conclusions. The latter will readily discern, for example, that the initiative can be used to submit constitutional amendments without sifting by any deliberative body and, thus, that, in an important sense, Ohio takes greater care in legislative action than in modifying the organic law. He will observe, further, that the processes of popular legislation are rather ponderous but that the general assembly has considered it necessary to add refinements in procedure to preserve the integrity of the process.

There are deeper policy considerations which should be explored. We shall conclude by merely suggesting one or two of them in the form of questions. Is popular legislation any more free than representative action from the influence of pressure groups? Is it calculated to increase or decrease responsibility in our legislative assemblies? Does it consist with modern developments, which provide various research and drafting aids for our legislatures and enable them to conduct the policy-making function on a more continuous non-fragmentary basis? Can the voters be expected to exercise informed judgment except on proposals involving clear-cut, easily understood issues? There is much interest in the short ballot. Are the short ballot and popular legislation consistent?